IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., SEHEL, J.A And MAIGE, J.A.:)

CRIMINAL APPEAL NO. 610 OF 2020

1. **MASUMBUKO ZACHARIA @ DOGO ASLEI**
2. **FINIAS PAULO**
3. **PASCAL JAMES @ PASI**

..... **APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Bahati, J.)

dated 8th day of May, 2020

in

Criminal Appeal No. 73 of 2018

.....

JUDGMENT OF THE COURT

13th & 21st July, 2022

MWARIJA, J.A:

The appellants, Masumbuko Zakaria @ Dogo Aslei, Finias Paulo and Pascal James @ Pasi (the 1st, 2nd and 3rd appellants respectively) were charged in the District Court of Muleba with two counts under the Penal Code [Cap. 16 R.E. 2002, now R.E. 2022] (the Penal Code). In the 1st count, they were charged with the offence of conspiracy to

commit an offence contrary to s. 384 and in the second count, the offence of armed robbery contrary to s. 287A both of the Penal Code.

It was alleged that on unknown date in January, 2018 at Kinagi Village in Muleba District within Kagera Region, the appellants conspired to steal TZS. 2,000,000.00 and on 2/1/2018 at the same place stole the said amount of money from Tumaini Zakaria and immediately before or after the time of stealing, used a screw driver to assault the said victim.

All appellants denied the two counts and as a result, the case proceeded to a full trial at which, the prosecution relied on the evidence of eight witnesses, whereas each of the appellants relied on his own evidence in defence.

At the conclusion of the trial, the learned trial Resident Magistrate found that the 1st count had not been proved. He consequently acquitted the appellants of the offence charged in that count. As to the 2nd count, he found it proved against the appellants. He thus found them guilty and proceeded to sentence each of them to an imprisonment term of thirty years.

The appellants were aggrieved by the decision of the trial court. They appealed to the High Court vide Criminal Appeal No. 73 of 2018. Their appeal was however, unsuccessful hence this second appeal.

The factual background of the appeal may be briefly stated as follows: The victim, Tumaini Zefania was until the material time a fish retailer conducting her business at Kinagi Village in Muleba District. On 2/1/2018 during the night while on the way in the same village, she met four youths who attacked her. One of them told her that they had been instructed by their boss, one Kulwa, to kill her and that the said person had given TZS. 20,000.00 to each of them so as to use it to become drunk and execute the act of killing her. The victim raised an alarm and one person, Kasala Baunsa, responded by rushing to the scene and when the four youths saw him, they ran away. He assisted the victim by taking her to a nearby guest house.

The incident was reported to the village Chairman who later on wrote a letter referring the victim to the police for further action. At the police post, Izigo, she was issued with a PF3 by No. G 5977 DC. Mohamed (PW5) and went to Kagondo Hospital for treatment. The appellants were implicated with the offence and were thus arrested and charged as shown above.

The victim of the offence testified as PW1. It was her evidence that she identified the four youths to be the appellants and one Msome who she said, had a machete but ran away from the scene after the other youths had assaulted and robbed her TZS. 2,000,000.00 which she had carried in her bag. PW1 went on to state that the appellants stabbed her with a screw driver. She said further that, she managed to identity the appellants who were known to her before by aid of moonlight. According to her evidence, she had known the appellants for five years because they had been staying together at the same area for all that period. She added that, she knew them by names and as for the 3rd appellant, even by his voice. As to the intensity of the moonlight, it was her vidence that it was bright enough to enable her identify her assailants.

It was PW1's further evidence that, when she was taken to Kagondo Hospital, she was admitted and from the nature of the injury which she sustained on her hand, she had to undergo a skin grafting operation. The Clinical Officer who treated her, Dominicus Richard (PW7) testified that, when he examined PW1, he found out that, apart from the injury on her arm, she had multiple injuries on her neck and joints. He said further that, because in the course of injuring her, part

of the skin was removed from her arm, a skin grafting had to be performed in order to restore the removed skin.

On his part, Kasala Baunsa Hitler who testified as PW2 testified that, on the material date while on the way to a guest house, he heard an alarm and rushed to the scene where he saw the appellants. He realized the alarm was raised by PW1 who had been wounded. He assisted to take her to the guest house owned by her brother. According to his testimony, PW2 identified the appellants with the aid of moonlight. Like PW1, he said that, the appellants were known to him before as they were until the material time, involved in fish business in the same area.

Amos Zefania, PW1's brother who received her at the guest house, testified as PW4. He said that, when she was taken there by PW2, she had a wound on her hand and told him that she was attacked by the appellants who robbed her TZS. 2,000,000.00. He added that PW2 named the appellants who were traced and arrested. They were arrested by among others, No. G 7579 PC. Hamisi (PW6) and after investigation which was conducted by No. E 5219 DC Ali, they were charged as indicated earlier.

In their defence evidence, the appellants challenged the prosecution evidence contending that the same was fabricated. In his testimony, the first appellant (DW1), testified that the evidence of PW1, PW2, PW3, PW4 and PW5 should not have been believed because they were not telling the truth. On his part, the second appellant, (DW2) said that, he was arrested on 2/1/2018. He said further that he was taken to Izigo Police Post and later to Muleba Police Station. He was thereafter taken to court to answer the offences charged. He admitted that he had known the 1st and 3rd appellants before and that he was aware that PW1 was the lover of their boss, one Raphael.

With regard to DW3, he raised an *alibi* contending that on 16/1/2018 he travelled from Bukoba to Mwanza but disembarked at Kagoma with a view to see his relative. While on the way, he said, he was attacked by unknown persons. He was saved from further attack by the leader of the said village who referred the incident to Izigo Police Post. Having arrived there, DW3 went on to state, charges were prepared and was then taken to court where he was arraigned. As for his whereabouts on the date of the incident, it was his evidence that during the material night, he was asleep at the fishing camp. It was his evidence further that, from the prosecution evidence, the conditions for

identification at the scene of crime were not favorable adding that the evidence of PW3, PW6 and PW7 was a hearsay. He admitted however, that he had known the 1st and 2nd appellants as well as PW1 before the date of the incident.

As pointed out above, whereas the learned trial Resident Magistrate had found that the 1st count was not proved, he found to the contrary as regards the 2nd count. He found that the appellants were properly identified at the scene of crime by PW1 and PW2. He took into consideration the fact that PW1 and the appellants who were staying in the fishing village had known each other for five years before the material date and that there was favourable conditions for identification because of sufficient moonlight. He found also that there was a short distance of five paces between them at the time of the incident. He also relied on the evidence of PW1 which he found to have been supported by PW2's testimony on that aspect. On the appellants' defence, the learned trial Resident Magistrate was of the view that the same did not cast any reasonable doubt on the prosecution evidence, particularly that of PW1 and PW2 which he found to be watertight.

As stated above, the appellants' appeal to the High Court was unsuccessful. After having re-evaluated the evidence, the learned High

Court Judge was of the view that, the identification evidence of PW1 and PW2 could not be shaken. She found that the conditions for identification of the culprits were favourable and more so because, the appellants were known to PW1. With regard to the PF3, the learned appellate Judge found that the same was not properly admitted in evidence because it was not read out after its admission. She therefore expunged it from the record. That notwithstanding, it was her opinion that the remaining oral evidence adduced by the prosecution witnesses proved that PW1 was injured. She found further that the instrument used to injure the victim was a screw driver.

In this appeal, the appellants have raised a total of nine grounds of appeal. The complaints in both the memorandum of appeal and the supplementary memorandum can however, be consolidated into six grounds as follows:

1. That the learned High Court Judge erred in law in upholding the decision of the trial court while the appellants' conviction was based on a charge which was not only defective but to which the appellants were not called upon to plead.
2. That the learned High Court Judge erred in law in failing to find that the preliminary hearing was conducted in contravention of s. 192 (1), (2) and (3) of the Criminal Procedure Act.

3. That the learned High Court Judge erred In law in upholding the decision of the trial court while the recorded evidence of the witnesses was not authenticated by the trial magistrate in terms of s. 210 (1) (a) of the Criminal Procedure Act.

4. That the learned High Court Judge erred in law and fact in failing to find that the evidence of PW5 was invalid for having been taken without oath in contravention of s. 198 (1) of the Criminal Procedure Act.

5. That the learned High Court Judge erred in law and fact in upholding the appellants' conviction which was based on insufficient identification evidence.

6. That the learned High Court Judge erred in law and fact in upholding the appellants' conviction while the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal, the appellants appeared in person, unrepresented while the respondent Republic was represented by Mr. Hezron Mwasimba, learned Senior State Attorney. When they were called upon to argue their appeal, each of the appellants re-iterated the contents of their grounds of appeal and urged us to allow the appeal.

On his part, the learned Senior State Attorney opposed the appeal arguing that the raised grounds are devoid of merit. On the 1st paraphrased ground in which the appellants contended that the charge

was defective because, **first**, the time of the commission of the offence is not indicated, **secondly**, that the appellants did not plead to the charge and **thirdly**, that the charge was amended without sufficient reasons, Mr. Mwasimba argued that, the contentions are without merit. It was his submission that, the omission to specify the time of the incident is not fatal because it is clear from the evidence that the offence was committed during the night. He argued further that, the appellants' plea was taken on 15/2/2018 in respect of the last amended charge. That fact, he said, appears on page 13 of the record of appeal. As to the amendment of the charge, the learned Senior State Attorney argued that the prosecution had the right to do so without giving reasons to the appellants.

Having gone through the record, we agree with the learned Senior State Attorney that this ground of appeal is devoid of merit. It is clear from the record that, it was the amended charge filed on 5/2/2018 on which the appellants were prosecuted. They pleaded to that charge on the same date of filing (5/2/2018) as the proceedings appearing on page 13 of the record reflects. As for the omission to indicate the time at which the offence was committed, we agree with Mr. Mwasimba that, the defect is not fatal. It was undisputable that the incident occurred

during the night. The only dispute was whether it was the appellants who committed the offence. The appellants were therefore, not prejudiced by the omission.

On the amendment of the charge, it is not a requirement that the same must be done upon the reasons which are acceptable to an accused person. It is practically done upon leave of the court. What is mandatory is that an accused person must be called upon to plead. In the present case, the amendment which was due to the joining of the 3rd appellant, was made before the hearing had commenced and all the appellants were afforded the right to plead to that charge.

On the 2nd ground concerning the conduct of the preliminary hearing, that the appellants did not plead to the charge, we also agree with the submission of the learned Senior State Attorney that the complaint is unfounded. The preliminary hearing conducted on 5/2/2018 was based on the last amended charge filed on the same date. The appellants pleaded to the charge and it is on that charge that their trial was based. This ground is therefore similarly devoid of merit.

With regard to the 3rd ground, the learned Senior State Attorney disputed the appellants' contention that the learned trial Resident

Magistrate did not append his signature after recording the witnesses' evidence. He submitted that such contention is not supported by the record. Indeed, according to the record, the trial Magistrate complied with s. 210 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2022] (the CPA) by appending his signature after having recorded the evidence of each of the witnesses including the defence witnesses. That ground thus fails.

The 4th ground of appeal need not detain us much. As submitted by the learned Senior State Attorney, although the record does not show that PW5 was affirmed before he testified, it is clear from original record that the witness was affirmed. It was due to omission in typing part of the proceedings dated 7/5/2018 that such information is missing on page 26 of the record of appeal. The contention that the evidence of PW5 was recorded in contravention of s. 198 (1) of the CPA is therefore, lacking in merit. We also do not find merit in the appellants' argument that PW5 should not have testified because his force number was stated in the preliminary hearing as G. 3977 instead of G. 5977. We find that to be a typing error which did not prejudice them.

In the 5th and 6th grounds of appeal, the appellants contend that the evidence of identification was insufficient hence the case was not

proved beyond reasonable doubt. Mr. Mwasimba argued that, as found by the two courts below, the appellants were properly identified. In stressing that complaint, in his rejoinder submission, the 3rd appellant argued that the identification evidence was insufficient because the time spent by the culprits at the scene was not stated. He cited the case of **Simeo Stephano v. Republic,** Criminal Appeal No. 324 of 2020 (unreported) to support his argument. Secondly, relying on the case of **Francis Majaliwa Deus and 2 Others v. Republic,** Criminal Appeal No. 139 of 2005 (unreported), he argued that since identification parade was not conducted, the identification evidence of PW1 and PW2 should not have been acted upon.

Having gone through the record, we are of the considered view that the evidence of identification of the appellants was watertight. **First,** they were known to PW1 and PW2, **secondly,** the conditions for their recognition were favourable as there was moonlight and the distance was close such that it was possible to attack and injure PW1. On the intensity of the moonlight, in her evidence in-chief, at page 19 of the record, PW1 stated that *"there was moonlight enough to identify them"*. Furthermore, when cross-examined, she stated as follows at

page 21 of the record; "*there was strong (sic) moonlight enough to identify you.*"

In such a situation, it cannot be said that the evidence of identification was insufficient as to give room for possibility of a mistaken identity of the appellants. In the case of **Anatory Nangu and Another v. Republic**, Criminal Appeal No. 109 of 2006 (unreported), cited by the learned Senior State Attorney, the offence was committed under the circumstances similar to the case at hand. The culprits were known to the victim. The Court had this to say on reliability of such identification evidence:

> *"The conditions for identification in this case as gathered from the evidence were favourable. The complainant knew the appellants before, they were staying together in the same village and there was moonlight .... It took sometime before the offence was committed as the attack was preceded by a conversation. PW2 corroborated the evidence of PW1 on the identification of the first appellant. Under these circumstances, we agree that there was no room for mistaken identity."*

The argument by the 3rd appellant that the period under which PW1 had the appellants under observation, is not valid because, the

attack was not sudden. Like in the cited case above, it was preceded by conversation. The appellants started by informing PW1 that they had been sent to kill her. They then proceeded to attack her and fled only when PW1 raised an alarm and after PW2 had arrived at the scene. On the argument that the prosecution should have conducted identification parade, we find that it was unnecessary because the appellants were known to PW1. – See for instance, the case of **Doriki Kagusa v. Republic**, Criminal Appeal No. 174 of 2004 (unreported). In that case, the Court observed as follows:

> *"The identification parade was absolutely unnecessary where the identifying witnesses knew the suspect before the incident; it is superfluous and waste of resources to conduct such parade. We have asked ourselves this question; the identification parade is held to achieve what purpose when the suspect iis well known to the identifying witnesses? Our answer has already been indirectly given above. It is unnecessary and waste of time."*

On the basis of the foregoing, we find that the 5th ground of appeal is without merit. That finding answers also, the 6th ground of appeal, that the appellants who had in their possession a screw driver, robbed TZS. 2,000,000.00 from PW1 after they had attacked and

wounded her. Their conviction was therefore, well founded. In the event, we find that the appeal is devoid of merit and thus dismiss it in its entirety.

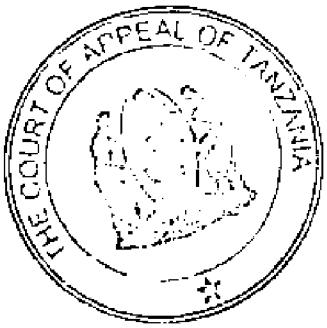
DATED at **BUKOBA** this 21st day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 21st day of July, 2022 in the presence of 1st, 2nd and 3rd appellants in person and Mr. Juma Mahona, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



O. A. Amworo
DEPUTY REGISTRAR
COURT OF APPEAL